Supreme Court, U. S.
FILED
MAR 21 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 76-1305

WILLIAM M. SIMS, Petitioner

vs.

VIRGINIA ELECTRIC AND POWER COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING WRIT . .	6
CONCLUSION	27

AUTHORITIES CITED

Cases:

Awtrey v. Norfolk Western Ry. Co., 121 Va. 284, 93 S.E. 570 (1917)	24
Burks v. Webb, 199 Va. 296, 99 S.E. 2d 629 (1957)	17
Elliott v. U.S., 329 F. Supp. 621 (D. Maine, 1971)	13
Johnson v. Kellam, 162 Va. 757, 175 S.E. 634 (1934) . . .	17
Keller v. City of St. Louis, 152 Mo. 596, 54 S.W. 438 (1899)	16
Mihalcoe v. Holub, 130 Va. 425, 107 S.E. 704 (1921)	16

Authorities, Continued — Page

Moses v. Akers, 203 Va. 130, 122 S.E. 2d 864 (1961) . . 7, 8, 11, 13

Norfolk So. Ry. Co. v. Fincham, 213 Va. 122, 189 S.E. 2d 380 (1972) 14

Owen v. Dixon, 162 Va. 601, 175 S.E. 41 (1934) 17

Rayfield v. Lawrence, 253 F. 2d 209 (4th Cir., 1958) . . . 18, 22

Smith v. Hewett, 235 N.C. 615, 70 S.E. 2d 825 (1952) 15

Trueman v. United States, 180 F. Supp. 172 (E.D. La., 1960) 24

United States v. Price, 288 F. 2d 448 (4th Cir., 1961) 20

Walthew v. Davis, 201 Va. 557, 111 S.E. 2d 784 (1960) . . . 17

Watson v. Daniel, 165 Va. 564, 183 S.E. 183 (1936) . . . 8, 12, 13

Statutes: — Page

Code of Virginia, §8-629 (1975 Cum. Supp.) 8

Code of Virginia, §8-629 (1957 Replacement Volume) 10

Miscellaneous:

67 C.J.S., Parent and Child, §55 at 743 14

59 Am. Jur. 2d, Parent and Child, §129 at 230 14

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PETITION FOR A WRIT OF CERTIORARI
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FOR THE FOURTH CIRCUIT

William M. Sims prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled action on January 7, 1977 (Court of Appeals Opinion appended).

OPINIONS BELOW

The opinion of the Court of Appeals is appended.

JURISDICTION

The judgment of the Court of Appeals was entered on January 7, 1977. The jurisdiction of this Court rests on 28 U.S.C. §1254(1) (1966).

QUESTION PRESENTED

Whether the Court of Appeals erred in its interpretation of Virginia law to the effect that the collateral source doctrine does not apply and the plaintiff has not been damaged where all past medical expenses for the treatment of plaintiff's infant daughter have been paid by plaintiff's insurance, instead of by the plaintiff personally, and where there was no evidence presented that future medical expenses were likely to exceed plaintiff's existing insurance coverage.

STATEMENT OF THE CASE

William Sims (Sims) is the father of Jennifer Sims, a minor. Sims and Jennifer's mother, Marilyn Brannon, were divorced December 31, 1969, by a decree of the Law and Equity Court of Chilton County, Alabama. Jennifer's mother has since remarried. The divorce decree awarded custody of Jennifer to Mrs. Brannon, but it made Sims solely responsible for any medical expenses incurred by Jennifer, requiring him to maintain full medical and hospital coverage insurance for her.

On May 24, 1972, while living with her mother in Virginia, Jennifer was injured when she climbed a tree in her backyard and contacted a high voltage power line under the control of Virginia Electric and Power Company (Vepco). As a result, Jennifer required extensive medical treatment.

An action arising out of this incident, styled Jennifer Sims, a child, by her natural mother and next friend, Marilyn Brannon v. Virginia Electric and Power Company, was filed in Virginia State Court. Sims was not a party to this action, was not served with any of the pleadings, and never made an appearance or participated in any way in that proceeding. On March 1, 1974, that case was settled. In the Order Approving Compromise Settlement, the Court stated that the natural father (Sims) was outside the jurisdiction of the Court. Sims was otherwise not mentioned in the Settlement Order.

The instant action was thereafter filed by plaintiff Sims, a North Carolina resident, against defendant Vepco in the General Court of Justice, Superior Court Division, Forsyth County, North Carolina. The action was subsequently removed to the United States District Court for the Middle District of North Carolina and, thereafter, transferred to the United States District Court for the Eastern District of Virginia.

In his Complaint, Sims alleged that his daughter Jennifer was injured as a result of the negligence of Vepco. He sought damages for the medical expenses, both past and future, for the treatment of his daughter.

It was agreed at the time of trial that Sims's claim included $28,365.56 in medical expenses already paid on behalf of Jennifer by insurance companies solely as a result of Sims having obtained and having kept in full force medical and hospital insurance coverage on Jennifer. The case was tried to a jury on July 1, 1975. The District Court applied the Virginia "collateral source" doctrine and ruled that Vepco could not take advantage of the fact that the past medical expenses had literally been paid by Sims's insurance carrier tather than by Sims personally. No evidence regarding the limits of Sims's insurance policy was attempted to be introduced. The District Court also instructed the jury that it could consider as damages only those future medical expenses which had been proved with reasonable certainty. Dr. Judson Randolph testified that future surgery on Jennifer, particularly with regard to extensive revisional surgery on her face, her neck, her right axilla, and her left hand, would cost between $25,000 and $40,000.

The jury rendered its verdict for Sims and awarded damages in the

amount of $35,000. Judgment was entered accordingly against Vepco, and Vepco appealed to the United States Court of Appeals for the Fourth Circuit.

The Court of Appeals reversed the judgment of the District Court and entered judgment for Vepco. The sole issue decided by the Court of Appeals, and upon which the entire decision was based, was that Sims had not suffered any damages.

The Court held that under its interpretation of Virginia law, the collateral source doctrine did not apply because all past medical expenses for Jennifer's care and treatment had been paid, not by Sims, but by Sims's insurance coverage. The Court stated that "Sims has suffered no injury. He has not been physically hurt and has not been required to pay any money because of the injury to Jennifer." As to future medical expenses awarded by the jury, the Court stated that since there was no evidence presented at trial that future expenses for Jennifer's treatment would be likely to exceed Sims's existing insurance coverage, the collateral source doctrine again did not apply, and Sims was not entitled to damages for future medical expenses.

REASONS FOR GRANTING THE WRIT

The question presented by this petition involves the very basic issue of the extent of power in a federal court in a diversity action to overturn, in effect, a long-standing and well-settled doctrine of state law. It is respectfully submitted that the decision of the Court of Appeals in this matter is in direct conflict with both applicable state law and other decisions of the Fourth Circuit interpreting that same state's law. If this decision is allowed to stand, it will seriously impair and alter future applications of the collateral source doctrine in Virginia and elsewhere within the Fourth Circuit to the substantial detriment of the petitioner and of future plaintiffs who have the prudent foresight to have insurance coverage.

The precise issue which is presented in this petition may be stated as follows:

> Under Virginia law, may a father recover from the tortfeasor the sums expended for medical treatment of his infant daughter where all of the past medical expenses have been paid by the father's insurance carrier, rather than by the father personally, and where there is no evidence presented at trial that future

medical expenses for his infant daughter are likely to exceed the father's insurance coverage?

A. Sims's Cause of Action

In Virginia, two separate and distinct causes of action arise when an unemancipated infant is injured by a tortious act. In Moses v. Akers, 203 Va. 130, 122 S.E. 2d 864 (1961), the Virginia Supreme Court stated at 865-66:

> "It is well settled that in case of an injury to an unemancipated infant by wrongful act two causes of action ordinarily arise. One cause of action is on behalf of the infant to recover damages for pain and suffering, permanent injury and impairment of earning capacity after attaining majority. The other is on behalf of the parent for loss of services during minority and necessary expenses incurred for the infant's treatment. [citations] The parent's cause of action is founded upon the principle that he is primarily responsible for the necessary expenses incurred in curing or relieving the infant of his injuries. [citation]"

In Moses, supra, the Court further stated at 866 that an infant cannot recover medical expenses unless:

> "(1) he has paid or agreed to pay the expenses; or (2) he alone is responsible by reason of his emancipation or the death or incompetency of his parents; or (3) the parent has waived the right of recovery in favor of the infant; or (4) recovery therefor is permitted by statute."

None of the above exceptions applies in this case and, therefore, Jennifer could not recover her medical expenses in a suit against Vepco. In accord, Watson v. Daniel, 165 Va. 564, 183 S.E. 183 (1936).

The common law rule as to two causes of action arising out of an injury to an unemancipated minor has also been recognized in Section 8-629 of the Virginia Code. The statute allows the two causes of action to be tried at the same time, but emphasizes that if both are tried simultaneously, there must be distinctly separate verdicts and judgments. This statute, before its amendment in 1973, read as follows:

> "§8-629. Joinder of action of tort to infant with action for recovery of expenses incurred thereby. -- Where there is

pending any action by an infant plaintiff against a tort feasor for a personal injury, any parent, or guardian of such infant, who is entitled to recover from the same tort feasor the expenses of curing or attempting to cure such infant from the result of such personal injury, may bring an action against such tort feasor for such expenses, in the same court where such infant's case is pending, and upon motion of any party to either case, made to the court at least one week before the trial, both cases shall be tried together at the same time as parts of the same transaction. But separate verdicts when there is a jury trial shall be rendered in each case, and the judgment shall distinctly separate the decision and judgment in each case.

"In the event of the cases being carried to the Supreme Court of Appeals of Virginia, which may be done if there be the jurisdictional amount in either case, they shall both be carried together as one case and record, but the Supreme Court of Appeals shall clearly specify the decision in each case, separating them in the decision to the extent necessary to do justice among the parties."

The amended statute is as set forth below:

"§8-629. Joinder of action of tort to infant with action for recovery of expenses incurred thereby. -- Where there is pending any action by an infant plaintiff against a tort-feasor for a personal injury, any parent, or guardian of such infant, who is entitled to recover from the same tort-feasor the expenses of curing or attempting to cure such infant from the result of such personal injury, may bring an action against such tort-feasor for such expenses, in the same court where such infant's case is pending, either in the action filed in behalf of the infant or in a separate action. If the claim for expenses be by separate action, upon motion of any party to either case, made to the Court at least one week before the trial, both cases shall be tried together at the same time as parts of the same transaction. But separate verdicts when there is a jury trial shall be rendered, and the judgment shall distinctly separate the decision and judgment in the separate causes of action.

"In the event of the cases being carried to the Supreme Court of Virginia, which may be done if

there be the jurisdictional amount in either case, they shall both be carried together as one case and record, but the Supreme Court shall clearly specify the decision in each case, separating them in the decision to the extent necessary to do justice among the parties."

In Moses v. Akers, the Court explained the plain meaning of this statute at 866:

"Section 8-629, Code of 1950, 1957 Replacement Volume, recognizes the common law rule that two separate causes of action arise out of an injury to an infant by wrongful act." (Emphasis added)

Section 8-629 makes it clear that had Jennifer and her father filed claims at the same time and these claims had resulted in a judgment against Vepco, it would have been necessary that the jury determine each claim separately and that two different judgments be prepared. The two actions could not be consolidated into one.

A wholly distinct and separate cause of action arises with regard to the parent's claim for medical expenses related to curing the infant.

The next question, therefore, is in whose favor this claim for medical expenses arises -- whether the cause of action for medical expenses belongs to Sims, Jennifer's father, or to Mrs. Brannon, her mother.

The courts of Virginia have held that the parent who has the right to bring the action for medical expenses is the father. In Watson v. Daniel, 165 Va. 564, 183 S.E. 183 (1936), the Court held at 187:

"When the infant sued the defendants, the medical and hospital expense was sought to be shown as an element of his damage, but upon objection of the defendants the court correctly ruled that it was not proper in that action. The father is legally chargeable with such expense. It is his duty to provide his child with the necessary medical attention. . . . (Emphasis added)

* * * * *

"The father's action is one to recover the pecuniary loss he sustained by being required to furnish medical treatment to his child and by losing the child's services." (Emphasis added)

In Moses v. Akers, supra, in discussing who has the right to bring an action for an infant's medical expenses, the Court stated, 122 S.E. at 866, that since the father was dead, the mother was "primarily responsible for the necessary bills incurred" in the treatment of the infant's injuries. The mother, therefore, could maintain the action for medical expenses. In the present case, Sims is obviously not dead. In addition, not only did Sims have the primary responsibility for payment of all of Jennifer's medical bills under both Virginia law and the terms of the divorce decree, he has in fact caused these medical bills to be paid.

A Federal District Court in Maine, applying Virginia law, has also held that the father is the parent entitled to recover medical expenses. Elliott v. U.S., 329 F. Supp. 621 (D. Maine 1971). The holding of the Court, based on Moses v. Akers, supra, and Watson v. Daniel, supra, was stated at 629:

> "Kerri Lynn's father is, of course, entitled to recover for past and future medical expenses, including the expenses of any special therapy or special schooling, which may be required in the care and treatment of

> Kerri Lynn during her minority. Moses v. Akers, 203 Va. 130, 122 S.E. 2d 864 (1961); Watson v. Daniel, 165 Va. 564, 183 S.E. 183, 187 (1936)." (Emphasis added)

To the same effect is a recent case from Virginia, Norfolk Southern Railway Co. v. Fincham, 213 Va. 122, 189 S.E. 2d 380 (1972), which states at 384 that "[t]he father's cause of action for medical and incidental expenses was a derivative action. . . ." (Emphasis added)

Virginia law regarding the father's duty to support his children is in conformity with the law found in most other jurisdictions. 67 C.J.S., Parent and Child, §55, at 743, provides:

> "Where the duty of support remains with the father after separation of the parents, although the custody of the child was given to the mother, the right of action is not in the mother, but in the father."

59 Am. Jur. 2d, Parent and Child, §129, at 230, provides:

> "The fact that the mother has the custody of the child by virtue of a judicial decree does not entitle her to sue for injury to it so long as

the father is still charged with the duty of support. . . ."

In addition, two other jurisdictions have held that even though the parents of the injured child are divorced, the father is the proper party to maintain the action for the child's medical expenses. In Smith v. Hewett, 235 N.C. 615, 70 S.E. 2d 825 (1952), the plaintiff was 17 years of age. His parents had been divorced for several years, but there was no court order regarding his custody. He lived part of the time with his mother and part of the time with his grandmother. The hospital bills resulting from his injuries were charged to the father. In holding that the father was not estopped to bring his action for medical expenses since, notwithstanding the divorce, he was still liable in law for the medical and hospital expenses of his son, the Court held the following at 827:

> "The father is under the legal duty to support his child during minority, and he has the right of action to recover for loss of earnings and for expenses incurred for medical care in treating an injury to his child caused by the wrongful act of another. He would have right to maintain an action to recover the amounts he had paid thereon, and also for those for which he is legally liable."

A similar conclusion was reached in the case of Keller v. City of St. Louis, 152 Mo. 596, 54 S.W. 438 (1899). In that case, the mother sought to recover damages for injuries to her minor son. The child's parents were divorced at the time of the action and the divorce decree awarded the children to the mother. The decree made no reference to the support of the children. The Court held at 439:

> "It follows, then, that, as the duty of supporting the child was not transferred by the decree to the mother, it still remained with the father; and, as the right to the services of the child rests upon the duty to support, the right of action in this case is in him, and not in the plaintiff, and cannot be maintained by her. The judgment of the circuit court will therefore have to be, and is, reversed."

As to a father's duty of support to a child who lives with another, the Virginia Court stated in Mihalcoe v. Holub, 130 Va. 425, 107 S.E. 704, 706 (1921), that:

> "The rules are much the same regarding support of infant children by a father. He owes them the duty of maintenance. This by the weight of American authorities, founded

upon common sense and natural justice, is a legal, and not merely a moral, obligation. Where the child is living away from the father, the question of his liability will depend upon the circumstances of the case. . . ."

B. The Collateral Source Doctrine

There is no question but that the "collateral source" doctrine is the law of the Commonwealth of Virginia. In Walthew v. Davis, 201 Va. 557, 111 S.E. 2d 784 (1960), the Virginia Supreme Court stated at 788:

> "It is well settled that damages recovered for personal injuries or death caused by the negligence of another cannot be reduced by reason of the fact that the injured party or his estate has been partly compensated for the loss by the proceeds of an insurance policy. The reason for the rule is that one who by his negligence has injured another owes to the latter full compensation for the injury inflicted by him, and payment for such injury from a collateral source in no way relieves the wrongdoer of his obligation."

For the same holding, see Burks v. Webb, 199 Va. 296, 99 S.E. 2d 629 (1957); Owen v. Dixon, 162 Va. 601, 175 S.E. 41 (1934); Johnson v. Kellam, 162 Va. 757, 175 S.E. 634 (1934).

In actions brought in federal court where Virginia law applies, the United States Court of Appeals for the Fourth Circuit has consistently applied the collateral source doctrine to prevent a wrongdoer from taking credit for sums received by the plaintiff from another source. In Rayfield v. Lawrence, 253 F. 2d 209 (4th Cir., 1958), the plaintiff had received medical care at a government hospital totally free of charge to the plaintiff. In an action against the defendant, the trial court applied the collateral source doctrine and allowed the jury to consider as damages the reasonable value of medical services furnished the plaintiff even though the plaintiff had not expended any money for those services.

On appeal, the Fourth Circuit affirmed the action of the trial court and noted that the collateral source doctrine is the rule in many other jurisdictions, including the United States Court of Appeals for the District of Columbia. The Court stated at 213-14:

> "It is well settled in most jurisdictions including Virginia where this accident occurred, that an injured person may recover in full from a wrongdoer regardless of any compensation he may receive from a collateral source.

* * * * *

"All the Virginia cases on the subject of 'collateral payments' involve insurance beneifts for which the plaintiff has paid a premium. The defendant contends that this court should make a distinction in cases where the 'collateral source' payments resulted from some monetary payment by the plaintiff, such as the payment of insurance premium, and the instant case where the plaintiffs have in fact paid no actual consideration for the services they received. This contention is untenable.

* * * * *

"In a well-considered opinion, which cites the Sainsbury and Plank cases with approval, the Court of Appeals for the District of Columbia, in Hudson v. Lazarus, supra, stated the modern rule, as applied to servicemen receiving free hospital and medical care, as follows [217 F. 2d 346]:

> 'In general, the law seeks to award compensation, and no more, for personal injuries negligently inflicted. Yet an injured person may usually recover in full from a wrongdoer regardless of anything he may get from a "collateral

source" unconnected with the wrongdoer. Usually the collateral contribution necessarily benefits either the injured person or the wrongdoer. Whether it is a gift or the product of a contract of employment or of insurance, the purposes of the parties to it are obviously better served and the interests of society are likely to be better served if the injured person is benefitted than if the wrongdoer is benefitted.'"

The Fourth Circuit again applied the Virginia collateral source doctrine in United States v. Price, 288 F. 2d 448 (4th Cir., 1961). There, the plaintiff had received certain benefits under the Civil Service Retirement Act for which the defendant sought credit. In holding that such benefit from a collateral source could not be used to offset an award against the plaintiff, the Court stated at 449-50:

> "On the other hand, where the injured plaintiff's compensation comes from a 'collateral source,' it should not be offset against the sum awarded for the tort nor considered in determining that award. Clune v. Ristine, 8 Cir., 1899, 94 F. 745, 749; Hudson v. Lazarus, 1954, 95 U.S. App. D.C. 16,

217 F. 2d 344, 346-347, certiorari denied 349 U.S. 968, 75 S. Ct. 906, 99 L. Ed. 1289, rehearing denied 350 U.S. 856, 76 S. Ct. 43, 100 L. Ed. 761; 25 C.J.S. Damages §99; 15 Am. Jur., Damages, §§198-201; and see particularly Judge Collins' review of the cases in Plank v. Summers, 1954, 203 Md. 552, 102 A. 2d 262.

"This rule, that compensation from a collateral source should be disregarded in assessing tort damages, has been recognized several times by this court. Brabham v. Baltimore & O. R. Co., 4 Cir., 1914, 220 F. 35, 37-38, L.R.A. 1915E, 1201; Sainsbury v. Pennsylvania Greyhound Lines, 4 Cir. 1950, 183 F. 2d 548, 550, 21 A.L.R. 2d 266; and most recently in Rayfield v. Lawrence, 4 Cir., 1958, 253 F. 2d 209 (applying Virginia law). As this is the law of Virginia, it is controlling in the instant case. Johnson v. Kellam, 1934, 162 Va. 757, 175 S.E. 634; Owen v. Dixon, 1934, 162 Va. 601, 175 S.E. 41; Burks v. Webb, 1957, 199 Va. 296, 99 S.E. 2d 629, 636."

In the instant case, the opinion of the Court disregards these prior decisions of both Virginia state courts and of its own Circuit which apply the collateral source doctrine. The Court appears to state at page 8 of the

opinion that because all of the medical expenses, as opposed to only a part, had been covered by insurance, Sims cannot recover:

> "We reverse the judgment of the district court because Sims had paid nothing for Jennifer's cure and there was no evidence he would be expected to pay anything, not because the payments were by way of insurance, or other than from Sims pocket, which is merely incidental.
>
> "It is clear that Sims personally paid nothing in connection with medical expenses resulting from Jennifer's accident. All were covered by insurance. There is not any evidence that any future expenses of cure for Jennifer would be likely to be paid by Sims above the routine payments provided for in the divorce decree. The allegations in Sims' complaint that he 'has incurred' large medical expenses can be sustained only upon the assumption that Sims can claim credit for having incurred expenses actually paid by the medical and hospital insurance carrier."

This holding is contrary to both prior decisions and basic logic. In Rayfield, supra, the plaintiff was was allowed to recover expenses for

medical treatment even though he personally had not paid any amount for those services.

It is respectfully submitted that under the logic of the decision in the instant case, Sims would be allowed to recover for medical expenses if, for instance, his insurance coverage had only paid for eighty per cent of the expenses, or if his insurance coverage had been in some way deficient and had not provided coverage at all. The Court's holding, therefore, totally disregards the sound public policy upon which the collateral source doctrine is based by penalizing the prudent plaintiff who has obtained and kept in force full medical insurance. The careful foresight of the plaintiff is allowed to inure to the benefit of the wrongdoer, Vepco. This is exactly the situation which the collateral source doctrine attempts to prevent.

The Court in this case holds that because all past expenses have been paid by insurance, Sims has not been damaged. The opinion provides at pages 9-10:

> "Sims has suffered no injury. He has not been physically hurt and has not been required to pay any money because of the injury to Jennifer. He paid the insurance premiums because of the divorce decree, not as cure for his daughter, and the amount thereof has

> not been increased because of her injury."

The only authority cited by the Court for the basis of its holding -- that Sims has not been damaged -- was a Louisiana district court case, Trueman v. United States, 180 F. Supp. 172 (E.D. La., 1960). In that case, suit was under the Tort Claim Act for medical malpractice alleged to have occurred at an Army hospital. All medical expenses for the treatment of the child in that case had been paid by the defendant in the suit, not by private insurance, and, therefore, there was no collateral source issue. As to the action of the parents, the Court stated at 176:

> "In Virginia, absent proof of loss of services or expense incurred, the parents, as such, have no claim in damages for injury to their child. Their claims, therefore, must be dismissed."

The only Virginia authority cited by the Trueman court was Awtrey v. Norfolk Western Ry. Co., 121 Va. 284, 93 S.E. 570 (1917). In Awtrey, however, the Virginia Supreme Court was not even concerned with the collateral source doctrine, but rather was speaking to an entirely different issue. The Court in Awtrey stated at 93 S.E. 570, 572:

> "The plaintiff's real grievance is her mental anguish because of the tragic death of her son and the

heartrending and deplorable circumstances of his burial in Virginia; but under well-settled principles, she cannot recover for this, because there can be no recovery for mental anguish which is unaccompanied by actionable physical or pecuniary damage caused by the wrongful act of another. Connelly v. Western Union Tel. Co., 100 Va. 51, 40 S.E. 618, 56 L.R.A. 663, 93 Am. St. Rep. 919; C. & O. Ry. Co. v. Tinsley, 116 Va. 603, 82 S.E. 732."

Nevertheless, the instant opinion construes Trueman to be "analagous to the case at hand." The obvious difference between Trueman and the case at bar, it is submitted, is that in Trueman, the defendant wrongdoer had paid all of the infant's medical expenses, while in our case, private insurance maintained and paid for by the plaintiff paid for Jennifer's treatment.

With regard to reasonable future medical expenses for Jennifer's treatment, the Court stated at p. 13:

"By the same token, Sims is not entitled to recover for future expenses of cure. He has not paid out anything thus far. All of the payments for which he sues were made by the insurance provided for under the terms of the divorce decree. There is not a scrap of evidence in the record

that any future payments for cure will exceed the payments for insurance previously provided for under the decree. Since there is no proof that Sims is likely to have any future liability for the expenses of cure of his daughter other than that already provided in the decree prior to the accident, he may not recover for such in this action."

It is submitted that this portion of the opinion is merely self-serving and without a logical basis. Since the collateral source doctrine was applied by the trial court and, therefore, insurance coverage became irrelevant to the issues at trial, Sims did not introduce the limits of his medical insurance coverage into evidence. It is, therefore, obvious why there was not a "scrap of evidence" in the record that Sims, personally, would have to pay for future medical expenses, over and above his premium payments. Under the logic of the Court's opinion, however, if Sims's insurance policy had provided only modest limits of coverage, then he would be entitled to recover likely future medical expenses. Again, the holding of the Court is defeating the very purpose of the Virginia collateral source doctrine by allowing the wrongdoer to profit from the prudent action of the plaintiff.

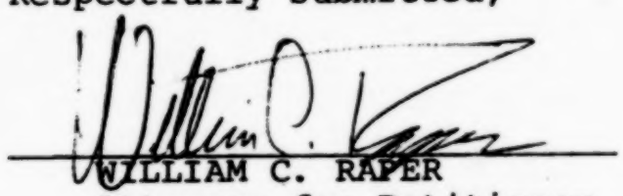
CONCLUSION

It is submitted that the decision and opinion of the Fourth Circuit overrules a most important and basic doctrine in the law of the Commonwealth of Virginia.

The novel interpretation of the Virginia collatral source doctrine in this case is both without a logical basis and contrary to prior decisions of the state and federal courts. Petitioner strongly contends that the decision in this case, if not reversed, will result in substantial injustice to Petitioner and to future plaintiffs who may have the prudent foresight to have insurance coverage.

For these and the other reasons stated, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-1950

WILLIAM M. SIMS

Appellee

v.

VIRGINIA ELECTRIC AND POWER COMPANY

Appellant

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued April 7, 1976

Decided January 7, 1977

Before BOREMAN, Senior Circuit Judge, RUSSELL and WIDENER, Circuit Judges.

Lewis T. Booker (George D. Gibson, Virginia W. Powell, Hunton, Williams, Gay & Gibson on brief) for Appellant;
William C. Raper (Allan R. Gitter, Jimmy H. Barnhill, Womble, Carlyle, Sandridge & Rice on brief) for Appellee.

WIDENER, Circuit Judge:

Plaintiff, William M. Sims, sued, in a North Carolina state court, to recover medical expenses which he has incurred, and expects to incur, as a result of the injury of his daughter, Jennifer Sims, alleged to have been due to the negligence of defendant. The case was removed to the United States District Court for the Middle District of North Carolina, and then transferred to the United States District Court for the Eastern District of Virginia. Trial by jury resulted in a verdict for plaintiff in the amount of $35,000 upon which judgment was entered. We reverse and direct entry of judgment for the defendant.

William M. Sims, plaintiff, and his then wife, Marilyn M. Sims, were divorced December 31, 1969 by an appropriate court of the State of Alabama. At that time, Sims had two daughters. The younger, Jennifer Sims, was between seven and eight years of age. The divorce decree, which incorporated a voluntary settlement between the parties, gave

custody of the children to the wife, Marilyn, but with visitation privileges to the father. Alimony was waived by Marilyn, but the decree required Sims to pay $200 per month, for several months, later to be increased to $250 per month, for the support of the two children. The decree also required Sims to maintain full medical and hospital insurance coverage on the two infant girls and a life insurance policy with coverage of $35,000 with said daughters as beneficiaries.

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1. The pertinent provisions of the decree and settlement agreement in the divorce case are as follows:

* * * * *

"It is further ORDERED, ADJUDGED AND DECREED that the agreement for settlement reached by the parties, dated December 30, 1969, is attached hereto, marked Exhibit A, and made a part of this decree, affirmed by the Court, be and is binding on

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Fn. 1 continued -

all parties, until further orders of this Court, the right to modify provisions concerning child support, custody and control being expressly reserved by this Court for further modification which may be justified by future changes in conditions.

* * * * *

"1. The wife shall have the custody and control of the infant children, Camille Sims and Jennifer Sims, but the husband shall have the right to visit, see and be with said children at reasonable times and places, and by making verbal advanced arrangements with the wife, may have their temporary custody on occasions convenient with the parties.

* * * * *

"5. The wife waives alimony and support for herself, but the husband agrees to pay support for the two said infant children in the amount

of Two Hundred Dollars monthly, payable by certified check or postal money order, no later than the 5th day of each month, in advance, to the Register of the Law and Equity Court of Chilton County, Alabama, or his successor in office, which money shall be forwarded by the Court to the wife for the support and maintenance of said infant children; with further stipulation that beginning August 5, 1970, said payments shall

Fn. 1 continued -

be increased to Two Hundred Fifty Dollars monthly until further orders of the Court.

"6. In addition to said payments, the husband agrees to keep and maintain full medical and hospital insurance coverage on said infants, and a life insurance policy with said children named as beneficiaries thereon, in the amount of Thirty Five Thousand Dollars, and upon request of the Court of the wife, he shall produce evidence and satisfactory proof that said insurance coverage is in full force and effect, and copies of such policy shall be furnished to the wife."

* * * * *

Sims has complied with his obligations under the divorce decree.

Some time subsequent to the divorce decree, Marilyn married Robert L. Brannon, Jr.

On May 24, 1972, the ten year old Jennifer Sims was climbing a tree in her yard in

Fairfax County, Virginia, when she allegedly came in contact with an electric wire under the control of Virginia Electric and Power Company (VEPCO). She fell to the ground and sustained serious injuries.

In 1973, a motion for judgment was filed by Jennifer Sims, by Marilyn Brannon as her natural mother and next friend, against VEPCO, in the Circuit Court of Fairfax County, Virginia. Marilyn waived her right to recover for the expenses involved in the cure of her daughter in favor of Jennifer in that case. William Sims was notified of the suit, but was not a party to it. On March 1, 1974, the Circuit Court of Fairfax County entered an order approving a settlement of the suit for $475,000.00, which amount, the order recited, had been paid into open court by VEPCO. The order contained a notation to the effect "the natural father was not within the jurisdiction of the Court."

The order of March 1, 1974, approving the settlement,

included a provision that $25,000 was to go to two escrow agents as partial security for an undertaking by Robert L. and Marilyn Brannon to indemnify VEPCO from any other claims arising out of the accident here involved.[2]

VEPCO'S contentions are that recovery by Sims in this action is barred by the compromise settlement in the Fairfax County action and the release entered into between VEPCO and Mr. and Mrs. Brannon, and Sims cannot recover expenses of curing Jennifer Sims since he has had and will have no liability for them.

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2. A copy of a letter from Jennifer Sims' then attorney, Charles H. Mayer, to her natural father, William Sims, appears several times in the record. The letter urges William Sims to execute a release of all claims he might have regarding the case of Jennifer Sims v. VEPCO. It was obviously because of William Sims' unwillingness to execute this release that the indemnification and escrow agreements were entered into.

We reverse the judgment of the district court because Sims had paid nothing for Jennifer's cure and there was no evidence he would be expected to pay anything, not because the payments were by way of insurance, or other than from Sims pocket, which is merely incidental.

It is clear that Sims personally paid nothing in connection with medical expenses resulting from Jennifer's accident. All were covered by insurance. There is not any evidence that any future expenses of cure for Jennifer would be likely to be paid by Sims above the routine payments provided for in the divorce decree. The allegations in Sims' complaint that he "has incurred" large medical expenses can be sustained only upon the assumption that Sims can claim credit for having incurred expenses actually paid by the medical and hospital insurance carrier.

Plaintiff relies upon the collateral source doctrine to support his contention that he is entitled to recover in this action against VEPCO monies

expended by the insurance company in connection with Jennifer's injuries. He argues that to deny his recovery is to apply the doctrine in violation of Walthew and Burks, infra. We hold that the collateral source doctrine is not applicable to the facts of this case, and that to deny Sims recovery does not amount to its application contrary to the law of Virginia. To support this contention, plaintiff relies upon Walthew v. Davis, admr., 201 Va. 557, 111 SE2d 784 (1960), and Burks v. Webb, admr., 199 Va. 296, 99 SE2d 629 (1957). These are clear cases for the true collateral source doctrine. In both cases, the administrator of a decedent prosecuted an action for wrongful death. It was held in each case that the alleged tortfeasor could not show in evidence that a statutory beneficiary of the deceased person was entitled to recover life insurance on account of the death complained of in order to diminish the damages payable by the wrongdoer.

The facts of our case are different. Sims has suffered

no injury. He has not been physically hurt and has not been required to pay any money because of the injury to Jennifer. He paid the insurance premiums because of the divorce decree, not as cure for his daughter, and the amount thereof has not been increased because of her injury. A true situation for application of the collateral source doctrine might exist if VEPCO had tried to defend Marilyn's and Jennifer's action upon the ground that the medical and hospital expenses had been paid by an insurance carrier, but that is not the case before us. In our case, VEPCO has paid once for the expenses of cure in Marilyn's and Jennifer's suit, so depriving a like recovery to Sims does not result in the wrongdoer's diminishing its damages.

The situation presented in Trueman v. United States, 180 F. Supp. 172 (E.D. La., 1960), applying Virginia law, is analogous to the case at hand. Suit was under the Tort Claims Act for medical malpractice alleged to have occurred at an Army hospital at Fort Eustis, Virginia. Suit by the parents was joined with a suit on behalf of the child. The father was an Army Sergeant. The

court, sitting without a jury, found in favor of the infant plaintiff. As to the action by the parents, it stated (p. 176):

> "In Virginia, absent proof of loss of services or expense incurred, the parents, as such, have no claim in damages for injury to their child. Their claims, therefore, must be dismissed."

Plaintiff seeks to distinguish Trueman upon the ground that the court in that case relied upon Awtrey v. Norfolk and Western Ry. Co., 121 Va. 284, 93 SE 570 (1917). In Awtrey, the plaintiff's only claim for damages was that the railroad company had failed to bury her son who was found dead on its tracks. The court held that there could be no recovery for mental anguish which is unaccompanied by actionable physical or pecuniary damage." Thus, plaintiff argues that Trueman is limited strictly to cases of mental anguish. Such an interpretation of Trueman we think unwarranted. The general principle which underlies both Trueman and Awtrey is that a party can only recover for actionable pecuniary damage. In

Awtrey, that principle was applied to a party's claim based wholly upon mental suffering. In Trueman, it was applied so as to deny recovery to a parent for medical expenses, when all medical and hospital services had obviously been paid or furnished without charge, by the government, the tortfeasor.

Plaintiff cites Elliott v. United States, 329 F. Supp. 621 (D. Maine, 1971), for the proposition that under Virginia law the father is the parent entitled to recover for medical expenses occasioned by a defendant's tortious injury to an infant child. Defendant properly points out that in Elliot there was no contest as between the two parents as there is here. So the question here was not before that court.[3]

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3. Elliot based its holding that past medical expenses, having been paid by the United States, were not recoverable, on the case of United States v. Brooks, 175 F2d 482 (4th Cir. 1949), which in turn was based on the rule that the government should not have to pay a loss twice, not upon the rule of Trueman that, absent an expense incurred, there was no obligation to pay.

We thus hold that, so far as Sims bases his claim to recover from VEPCO upon the basis of monies expended for the expenses of cure for Jennifer, he cannot recover because he has made no such expenditures. Sims has paid no more for Jennifer's cure than he was already obligated to pay, prior to the accident, under the divorce decree. The payments he made were in the nature of previously ascertained support payments under the decree, not expenses for curing his child. He is not entitled to recover as expenses for cure routine medical and hospital insurance payments provided for under a decree of divorce where the custody of the child has been given to the mother and where the payments have in no way been increased by the accident.

By the same token, Sims is not entitled to recover for future expenses of cure. He has not paid out anything thus far. All of the payments for which he sues were made by the insurance provided for under the terms of the divorce decree. There is not a scrap of evidence in the record that any future payments for cure will exceed the payments for insurance previously provided for under

the decree. Since there is no proof that Sims is likely to have any future liability for the expenses of cure of his daughter other than that already provided in the decree prior to the accident, he may not recover for such in this action. See Wine Beech, 194 Va. 601, 606, 74 SE2 149 (1953), that unlikely damages are not recoverable.

We do not have before us a case in which a divorced parent in Sims' situation has been assessed or charged with, or is likely to be liable for, or has paid, expenses of cure for a child in the sole custody of the other parent, and we express no opinion on that question.

Sims argues that in Virginia the father is primarily responsible for the expenses of cure for an injured child. See Watson v. Daniel, 165 Va. 564, 183 SE 183 (1936).[4] Assuming for argument the validity of this proposition as

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4. In no case called to our attention has there been any question raised between the mother and father, as here.

between the parents, or, indeed, for example, as in a suit by a hospital against the parents, it has no application here to give Sims a cause of action in his own right[5] disconnected from the payment of any expenses of cure and disconnected from any obligation to pay for the cure above the routine payment of hospital and medical insurance in a divorce decree.

In Virginia, for years, a married woman has had the right to sue and be sued in her own name. See Va. Code § 55-36. The mother, as well as the father, has the duty to support their child. See Department of Mental Hygiene v. Shepard, 212 Va. 843, ___ SE2 ___ (1972).[6] A divorced mother with sole custody of a minor child also has the right to compromise the child's claim for damages tortiously inflicted. Va. Code § 8-170.

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5. Separate from, and which would extinguish the claim of, the mother, under the facts here.

6. In Shepard the father was dead.

The parents' cause of action in Virginia for injuries to a minor child are based on loss of services and the responsibility of paying for the cure of the child. Moses v. Akers, 203 Va. 130, 132, 122 SE2 864 (1961). By the divorce decree, Sims' right to Jennifer's services ended subject only to some modification of the decree, which has not occurred. Under Virginia law, Marilyn had an equal responsibility with Sims for the payment of cure for the injuries to their daughter Jennifer. Marilyn had a right as a parent who was entitled to the services of Jennifer and responsible for the expenses of her cure to bring a suit for such expenses, which she did. This right of action was waived in favor of her infant daughter, about which no question is raised. Marilyn has collected from VEPCO for the expenses of cure, this being necessarily included in the settlement of the whole case. There is no question but that Marilyn had a right to do under Virginia law that which she did.

The question remains, however, as to whether Sims is

also entitled to sue since he did not sign a release and was not a party to the suit in Fairfax County. We hold that he is entitled to no recovery in this case. He has no right to the services of the child, and he has neither paid, nor is likely to be called upon to pay, any expenses of cure. Under these circumstances, we hold that Sims may not recover, not because he may not have any right to sue, which we do not decide, but because he has suffered no damage, which we do decide.

VEPCO additionally and plausibly argues that since the divorced wife, Marilyn, had a right to bring a case in her own name, as well as that of her daughter; had waived her claim in favor of the daughter; and had a right to compromise the whole suit; that upon the satisfaction of the claims in such a suit, VEPCO should be discharged from all liability, it being derivative as to the parents, whether or not the father participated. Because Sims may not recover in any event, it is unnecessary for us to decide the point, and we express no opinion on that question also.

The judgment of the district court must be vacated and remanded with directions to enter judgment for the defendant.

VACATED AND REMANDED.